



Reasons for decision

Office and Professional Employees International
Union,

complainant,

and

4384865 Canada Inc., operating as Ornge Air,

respondent.

Board File: 29620-C

Neutral Citation: 2012 CIRB 667

December 07, 2012

On September 17, 2012, the Office and Professional Employees International Union (OPEIU or the union) filed a complaint with the Canada Industrial Relations Board (the Board) alleging that 4384865 Canada Inc., operating as Ornge Air (Ornge or the employer) had violated sections 50(a), 50(b) and 94(1)(a) of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*) by introducing a new “on-call” Flight Directive on August 31, 2012. The Board issued an interim order pursuant to section 19.1 of the *Code* on September 26, 2012 (Order no. 693-NB), declaring that the Flight Directive that is the subject of the unfair labour practice complaint was of no force or effect with respect to the bargaining unit represented by the union.

A hearing on the merits of the union’s complaint was held in Toronto, Ontario, on October 22, 2012. Having heard the parties, the Board, composed of Ms. Elizabeth MacPherson, Chairperson, sitting alone pursuant to section 14(3) of the *Code*, has determined that the

employer's actions contravened sections 50(b) of the *Code*. These are the reasons for that decision.

Appearances

Mr. Micheil M. Russell, for the Office and Professional Employees International Union;
Messrs. Craig Rix and David Ross, for 4384865 Canada Inc., operating as Ornge Air.

I-Background

[1] Ornge provides air ambulance service from seven bases in Ontario (Toronto, Ottawa, London, Kenora, Thunder Bay, Sudbury and Moosonee), in accordance with a performance agreement with the Ontario Ministry of Health and Long-Term Care. With respect to the bargaining unit of rotor wing pilots represented by the union, Ornge is the successor employer to Canadian Helicopters Ltd. (CHL), which previously provided this service under contract to Ornge. The transition of employees from CHL to Ornge took place base-by-base over a period of months, with the first group (London) transferring on January 13, 2012 and the last group transferring on March 31, 2012. In a decision issued on May 28, 2012, *4384865 Canada Inc., operating as Ornge Air*, 2012 CIRB LD 2806, the Board found that Ornge became the employer of some, although not all, of the CHL employees as of January 13, 2012. By virtue of section 44 of the *Code*, Ornge is bound by the collective agreement between CHL and the OPEIU that was in force on the date that Ornge became the successor employer.

[2] The collective agreement for the rotor wing pilots expired on November 30, 2010. The OPEIU had been in bargaining with CHL for its renewal at the time that Ornge became the employer for the pilots at the bases in Ontario. The OPEIU served a notice to bargain on Ornge on January 10, 2012, thus triggering the provisions of section 50 of the *Code*, which read as follows:

50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement; and

(b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

[3] Section 3.06 of the collective agreement requires that pilots be provided with their schedules by November 1 of each year, for the following year's expected schedule rotation. In practice, an initial schedule is posted at each base, setting out the pilots' schedules from May 1 to April 30 of the following year, but these schedules are subject to amendment 30 days in advance of each month to account for personnel changes. Normal scheduled shifts are of 12 hours duration. A flight crew pairing consists of one captain and one first officer. If either of these individuals is unavailable for work (for example, because of illness or injury), Ornge endeavours to replace that person by offering overtime or by drafting in reverse order of seniority. These efforts are not always successful, even though pilots are remunerated at time and one-half for overtime and double time when drafted. As a result, situations have arisen in which Ornge has had an insufficient number of pilots available to provide the service required.

[4] Faced with mounting public scrutiny, Ornge issued Flight Operations Directive 028 (FOD 028) on August 31, 2012. This directive, entitled "On-Call Policy and Procedures" made provision for flight crew to be scheduled as "on-call" for a 24-hour period, commencing two hours prior to the normal day shift. Flight crew members scheduled as "on-call" were expected to be near a telephone during this period, to allow them to be readily and immediately reached and, if called in, to be available to report to work within one hour or at the start of the next regularly scheduled shift, whichever is later.

[5] The union notified the employer on September 4, 2012 of its view that the unilateral implementation of FOD 028 violated the statutory freeze provision of the *Code* and infringed on the union's status as the exclusive bargaining agent for the bargaining unit. In the absence of a response from the employer, the union filed this unfair labour practice complaint on September 17, 2012.

II—Positions of the Parties

A—The Union

[6] The union argues that this case is not about the interpretation of the collective agreement, which could be submitted to an arbitrator for determination, but is about multiple violations of the *Code*. It asserts that the employer has altered the status quo with respect to the scheduling of rotor wing pilots, exhibited blatant disregard for the union and consequently undermined the union's status as bargaining agent.

[7] The union submits that FOD 028 fundamentally changes the terms and conditions of employment for rotor wing pilots, without the consent of the union and without collective bargaining. Although the union was confirmed as the bargaining agent for the rotor wing pilots at Ornge by order of the Board dated February 16, 2012 (Board order no. 10219-U), and a conciliation officer was appointed by the Minister of Labour on October 2, 2012, the parties had not engaged in any collective bargaining as of the date of the hearing on the union's unfair labour practice complaint in late October 2012.

[8] The union states that it was not consulted by the employer before FOD 028 was issued on August 31, 2012, nor was it ever formally provided with a copy of the directive. Instead, the Chairman of the union's bargaining unit at Ornge received a copy of the directive in his capacity as an Ornge employee. Although the employer and the union met on August 20, 2012 to discuss outstanding grievances, the employer did not share a copy of the proposed policy with the union representatives at that time. The union states that it did not consent to the on-call policy, that the subject matter of the policy is dealt with in the collective agreement and that the union would not agree to changes to any provision of the collective agreement without conducting a membership ratification vote.

[9] The union asserts that work schedules are part of the terms and conditions of the pilots' employment, and that the alteration of those schedules, without the union's consent, constitutes a change in the terms and conditions of employment, as well as undermining the union's status as the exclusive bargaining agent for the pilots.

[10] The union explains that pilots normally work four, five or six 12-hour shifts in a row. The on-call schedule posted by the employer under its new policy has the effect of requiring an employee to be on-call for three or four 24-hour shifts in a row. This massive change, the union submits, has significant implications for the employees' terms and conditions of employment and their work-life balance.

[11] The union's evidence was that, when CHL was the employer, there was no "on-call" time scheduled at any of the bases except Moosonee, where coverage at night is provided through an on-call arrangement. At that base, pilots are only on-call for 12 hours at a time. The union submits that, when Ornge became the successor employer, it became bound by the CHL collective agreement which contains specific provisions regarding scheduling and the use of compressed work weeks and does not include a requirement for scheduled on-call status at any base other than Moosonee.

[12] In reply to the employer's argument that Article 1.14 of the collective agreement (Management Rights) allows Ornge to unilaterally implement its new on-call policy, the union points out that the collective agreement expressly provides that management rights are subject to a limitation with respect to matters addressed in the collective agreement. It submits that this limitation applies, among other things, to the subjects of hours of work and scheduling. In addition to the provisions in the collective agreement that limit management's rights with respect to these subjects, the union also points to the past practice and policy at CHL, which predated the collective agreement and which the union contends is also extended by section 50(b) of the *Code*.

[13] The union suggests that, as public safety is involved, the employer should have discussed the difficulties it was encountering in ensuring the availability of an adequate number of pilots and its proposed solution to this problem with the union, rather than unilaterally implementing FOD 028 without the union's consent. It alleges that the employer's failure to consult with the union on such a fundamental change to the employees' working conditions and its direct communication with employees regarding this matter undermined the union's status as the exclusive bargaining agent for all employees in the bargaining unit.

[14] The union alleges that, by proceeding as it did, the employer violated the statutory freeze set out in section 50(b) of the *Code*; failed to bargain in good faith, in violation of section 50(a) of the *Code*; and interfered with the union's representation of the members of the bargaining unit, contrary to section 94(1)(a) of the *Code*.

B—The Employer

[15] Ornge advises that it has a performance agreement with the Ontario Ministry of Health that requires it to provide 100% level of service (equipment and crew) at all times. The employer asserts that the greatest issue it has to deal with relates to pilot staffing. Ornge indicates that it has had serious problems with inadequate staffing that have, on occasion, prevented it from being in a position to deploy helicopters to respond to medical emergencies on a timely basis. The employer filed copies of press reports on recent incidents that have resulted in intense scrutiny and severe criticism of Ornge in the Ontario legislature and the media.

[16] In an effort to address this serious situation, Ornge has hired additional pilots and implemented the new on-call policy to ensure that there is always a flight crew available on-call in the event a scheduled pilot calls in sick or is otherwise unavailable to report to work. It points out that pilots who are not scheduled to work are under no obligation to remain fit for duty. Consequently, the employer submits that it is imperative that the employer be able to schedule specific pilots as "on-call" for defined periods of time, rather than relying on the chance that it will be able to find a replacement pilot who is fit for duty on short notice, as its predecessor did. The employer submits that it has the right to institute the on-call policy contained in FOD 028, and that doing so is simply "business as before", a permissible exception to the statutory freeze imposed by section 50(b) of the *Code*.

[17] Ornge's Director of Flight Operations – Rotor Wing, Peter Cunningham, previously worked at CHL's Toronto base. He indicated that pilots at that base worked a compressed work week composed of 12 hour shifts and that no-one was scheduled as on-call. Mr. Cunningham testified that, when he worked at CHL, there were 63 active pilots plus six who were on long-term leave for various reasons. In his view, this staffing level was inadequate. Since assuming his role at Ornge, Mr. Cunningham has recruited more pilots such that, at the time of the Board's hearing,

there were 80 active pilots with approval to staff eight more. Ornge also has four contractors in place who can be asked to cover any of its bases.

[18] Mr. Cunningham indicated that he used the existing language from the collective agreement to develop FOD 028 and that the new policy was approved by Ornge's Director of Flight Safety. Mr. Cunningham did not consult either the Director of Human Resources or the union with respect to the development of FOD 028. Neither did he discuss his concerns about staffing, overtime and drafting with the union prior to implementing FOD 028.

[19] When asked to compare FOD 028 with the collective agreement, Mr. Cunningham indicated that the collective agreement does not specify that the on-call period is of 24 hours duration, while the FOD does. The remuneration for time spent on-call under FOD 028 (12 hours pay) is greater than that provided for in the collective agreement (on-call hours multiplied by one-sixth of the regular rate of pay). Both the collective agreement and FOD 028 provide that an employee cannot be on duty and on-call at the same time. The difference between being on-call and on-duty is that when a pilot is on-call, he or she must be fit and ready for duty; when a pilot is on duty, they must not only be fit for duty, but must actually be at the location where the equipment is situated.

[20] In Ornge's view, the practice followed by CHL, which was to use overtime and drafting procedures to find replacements for absent flight crew members, is ineffective because there is no guarantee that a pilot who is not scheduled to work will be fit for duty and available. The employer suggested that there had been more than 300 instances in the previous six months in which it was unable to obtain a replacement pilot on short notice when the scheduled pilot called in sick or had worked the maximum allowable number of duty hours.

[21] Mr. Cunningham admitted that the on-call system established pursuant to FOD 028 would not eliminate overtime and drafting entirely. However, in his view, the new system would mean that those mechanisms would be used appropriately, when there was an emergency situation, and not to resolve regular staffing issues. Based on the employer's previous experience, Mr. Cunningham estimated that Ornge would utilize pilots called in from on-call status approximately 30% of the time.

[22] Omge argued that the Management Rights clause in the collective agreement gives it the right to plan and direct operations, determine the number of employees needed at any given time and the number of shifts to be worked. It suggests that Article 3 of the collective agreement gives the employer the right to amend schedules unilaterally and that the provisions of FOD 028 are not inconsistent with the collective agreement. The employer argues that FOD 028 was developed to address the insufficient staffing levels that Omge inherited from CHL and thus constitutes "business as before". It submits that section 50(b) should not be interpreted so as to paralyze an employer's ability to deal with critical situations.

[23] The employer also submits that, as the union has filed a grievance over this matter, the Board should decline to determine the complaint and defer to arbitration.

III—Analysis and Decision

[24] A significant part of the Board's mandate is to hear and decide complaints alleging violation of the *Code*. However, section 98(3) of the *Code* permits the Board to refuse to determine a complaint if the Board is of the opinion that the matter could be referred to arbitration. The Board is generally inclined to defer to arbitration when the matter requires the interpretation of a collective agreement and the underlying dispute or difference can be fully resolved through the arbitration process. In this case, the complaint alleges multiple contraventions of the *Code*, all matters that are clearly within the Board's mandate. It will not be necessary for the Board to interpret the provisions of the parties' collective agreement in order to determine the complaint. Accordingly, the Board does not consider this an appropriate case in which to defer to arbitration.

A—Alleged Violation of Section 50 of the *Code*

[25] The employer did not dispute the fact that notice to bargain had been given by the union and that the provisions of section 50 of the *Code* were in force at the time that it implemented FOD 028. It is also common ground that neither party had devoted much effort to bargaining a renewal of the collective agreement for the rotor wing pilots, as they were concentrating their resources on negotiating a first collective agreement for the aircraft maintenance engineers. As both parties are equally responsible for the lack of effort to meet the requirements of

section 50(a) of the *Code*, the Board dismisses the portion of the complaint that alleges violation of that provision.

[26] The remaining issue for determination under section 50 of the *Code* is whether the employer was entitled to change the manner in which it schedules the rotor wing pilots during the period of the statutory freeze set out in that section.

[27] The rationale for section 50(b) of the *Code* was explained by the Board in *BHP Billiton Diamonds Inc.*, [2006] CIRB no. 353 as follows:

[36] The essence of that section of the *Code*, which is commonly referred to as the freeze provision, is to maintain a balance between the parties during bargaining by removing an employer's ability to unilaterally change employees' working conditions, rights or privileges (see *Pacific Coast Terminals Co. Ltd. and Vancouver Wharves Limited* (1992), 87 di 113; 17 CLRB (2d) 238, and 92 CLC 16,033 (CLRB no. 922)). There are two reasons for seeking this balance. The first is to prevent the employer from lessening the authority of the bargaining agent in the eyes of the employees it represents by modifying terms and conditions of employment or rights and privileges in place. The second is that both parties must be able to bargain from an even footing (see *Purolator Courier Ltd.* (1987), 71 di 189; and 87 CLC 16,053 (CLRB no. 653)).

[28] The scope of the freeze contained in section 50(b) is quite wide. The *Code* protects all of the employees' terms or conditions of employment, whether articulated in the collective agreement or not, as well as "any right or privilege of the employees in the bargaining unit" (see, for example, *Air Canada* (1977), 24 di 203 (CLRB no. 113); *Conspec Limited* (1988), 76 di 85 (CLRB no. 721); and *Pacific Coast Terminals Co. Ltd. and Vancouver Wharves Limited*, *supra*). It is therefore possible that an action that does not violate the collective agreement could constitute a violation of section 50(b) of the *Code*.

[29] However, the Board has also held that section 50(b) does not prevent an employer from conducting "business as before" (see *Bank of Nova Scotia, Sherbrooke and Rock Forest* (1982), 42 di 398; [1982] 2 Can LRBR 21; and 82 CLC 16,158 (CLRB no. 367)). To determine what comes within the concept of "business as before," the Board looks at the overall circumstances of the employer's operations (*BHP Billiton Diamonds Inc.*, *supra*).

[30] In this case, both parties agree that Ornge's predecessor, CHL, had a policy regarding compensation for on-call status applicable to all personnel, but that CHL did not schedule rotor wing pilots to be on-call in any location other than Moosonee. When the rotor wing pilots opted

to unionize, CHL's on-call compensation policy was incorporated into Appendix "B" of the collective agreement. This collective agreement was in place at the time Ornge became the successor employer of the rotor wing pilots. There was no evidence before the Board that CHL had ever scheduled rotor wing pilots to be on-call, and the employer's witness testified that, when he worked for CHL at the Toronto base, the work week was composed of 12 hour shifts and that no-one was scheduled as on-call.

[31] The Board finds that, during the period when CHL was the employer, the terms and conditions of employment and rights or privileges of the employees in the bargaining unit at all bases other than Moosonee did not include scheduled on-call duty. Consequently, this was the status quo that was in place when Ornge became the employer and when the statutory freeze contained in section 50(b) of the *Code* came into effect. Consequently, unless the employer's initiative constituted "business as before", the employer could not unilaterally change these pre-existing terms and conditions of employment without the consent of the union.

[32] While the Board appreciates the imperatives that caused the employer to develop FOD 028, no evidence was provided to support the contention that the introduction of that Directive constituted "business as before". Although there was evidence that the employer frequently changes the posted schedule, such amendments relate to personnel changes or other reasons contemplated in the collective agreement. There was no evidence to suggest that the employer had ever scheduled anyone for a shift longer than 12 hours or to be on-call, other than in Moosonee. Accordingly, the Board finds that FOD 028, although directed at addressing a serious problem identified by the employer, was not "business as before" and therefore the employer was required to obtain the union's consent before implementing it.

[33] The employer's management rights, as set out in Article 1.14 of the collective agreement, are expressly limited by the contents of that agreement. The collective agreement contains provisions regarding hours of work, scheduling and on-call compensation and thus management rights with respect to these subject matters are constrained. Until the requirements of section 89(1)(a) to (d) of the *Code* have been met, the employer cannot amend or vary any of the provisions of the collective agreement relating to these matters without the consent of the union.

[34] Accordingly, the Board finds that the employer did violate section 50(b) of the *Code* when it implemented FOD 028 without the consent of the union.

B—Alleged Violation of Section 94(1)(a) of the *Code*

[35] Section 94(1)(a) of the *Code* provides:

94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ...

[36] In this case, the union alleges that the employer's actions interfered with its exclusive authority to bargain on behalf of the employees in the bargaining unit and thus its representation of those employees. The employer submits that there is no evidence that the union's status as the bargaining agent has been undermined.

[37] When employees choose to be represented by a trade union, the employer's ability to negotiate individually with those employees ends. The union becomes their exclusive bargaining agent. Section 94(1) of the *Code* reinforces this bargaining exclusivity by protecting the union from any employer activity that undermines the union's authority in the eyes of its members. The protection is aimed at both actions that are intended to undermine the union and those that merely have this effect (*Canada Post Corporation*, (1985) 63 di 136 (CLRB no. 544). In considering complaints under this provision of the *Code*, the Board applies an objective test that is concerned with the effect of the employer's actions on the legitimate rights of the union (*Canadian Broadcasting Corporation*, (1990) 83 di 102 (CLRB no. 839) affirmed, *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1992] 2 F.C. 665; leave to appeal to the Supreme Court of Canada denied, *Canadian Broadcasting Corporation v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; (1995)).

[38] The complainant is not required to demonstrate anti-union animus, but it does bear the burden of proving that the employer's actions violated the *Code*. Innocent conduct that has an incidental adverse effect has been held not to amount to a violation of this provision (*Canadian Pacific Ltd.*, (1985) 60 di 131 (CLRB no. 510)).

[39] In its submissions to the Board, the union did not seriously pursue its allegation that the employer had violated section 94(1)(a) of the *Code*. The Board is prepared to accept that the employer's actions were motivated by an honest, though mistaken, belief that it had the right to unilaterally implement FOD 028. There is no evidence that the union's status as the bargaining agent for the rotor wing pilots' bargaining unit has been undermined by the employer's action. Accordingly, the Board dismisses this portion of the complaint.

[40] As remedy for the violation of section 50(b) of the *Code*, the Board will extend the interim order that it issued on September 26, 2012, with an appropriate amendment to take into account the provisions of section 89(1) of the *Code*. The parties will find attached a revised Order.

[41] Signed on behalf of the Board by

Elizabeth MacPherson
Chairperson